

This is a claim for an August 9, 2004, accidental injury and alleged injuries to the right leg and right hip. In the June 23, 2006, Award, Judge Howard determined claimant's injuries were compensable under K.S.A. 44-510e and that claimant's pre-injury weekly compensation was \$1,056. The Judge then awarded claimant benefits for a 61.05 percent

permanent partial general disability based upon a 70 percent task loss and a 52.10 percent wage loss.

Respondent and its insurance carrier contend Judge Howard erred. They argue: (1) there is a question as to whether claimant injured his right hip as opposed to only injuring his right leg, (2) claimant's pre-injury average weekly wage is only \$528 rather than \$1,056 as found by the Judge, and (3) claimant is not entitled to a work disability as his post-injury earnings are comparable to his pre-injury wage. Consequently, respondent and its insurance carrier contend claimant should be awarded permanent disability benefits for a scheduled injury under K.S.A. 44-510d based upon his functional impairment rating. In the alternative, if claimant is entitled to receive permanent disability benefits under K.S.A. 44-510e, those benefits should be based upon his whole person functional impairment rating.

Conversely, claimant contends the 61.05 percent work disability should be affirmed.

The issues before the Board on this appeal are:

1. What is claimant's pre-injury average weekly wage?
2. What is the nature and extent of claimant's injury and disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

Claimant worked for respondent as a licensed surveyor. On August 9, 2004, while working at a job site, claimant fell into a basement. As a result of that accident, claimant fractured his lower right leg, which required surgery.

Claimant did not work the remainder of 2004. When he resumed working in 2005, claimant returned to respondent where he is now limited to office work due to his work-related injuries. Claimant's surgeon recommended that claimant permanently avoid walking more than three hours per day and do no squatting or crawling. As indicated above, the parties stipulated claimant's post-injury wage for purposes of this claim is \$505.85 per week. Moreover, claimant testified his fringe benefits had not been stopped.

1. What is claimant's pre-injury average weekly wage?

Claimant contends he owns a 60 percent interest in respondent, which is a Subchapter S corporation, by means of a verbal agreement with his brother. Conversely,

claimant's brother, Chad Wiswell, testified that claimant owns no interest in respondent. But both claimant and his brother contend respondent paid claimant a salary based upon \$24 per hour for 88 hours, twice a month. According to claimant and for reasons that are not fully explained in the record, the company's accountant, Ross Wakefield, advised claimant it would be best to designate part of his earnings as wages and part as business income. Consequently, claimant elected to receive \$12 per hour through the company's payroll account and \$12 per hour from the company's regular account.¹ Claimant testified, in part:

Q. (Mr. Davis) Now, when the corporation started up did you and Chad [claimant's brother] agree on how the two of you, let's just talk about you, would be compensated for your work with Blair Surveying?

A. (Claimant) Yes. We met with our CPA Ross Wakefield and he instructed us to decide how much money we were going to pay each other, which for me was going to be \$24 an hour. And then he said that, well, it would be best if you take a part of that, and by part of that we figured that we would just do half and half, so I took \$12 an hour as through a payroll account and then the other \$12 an hour he said that we would have to claim as a business expense.²

According to claimant, he was guaranteed a salary of \$24 per hour for 88 hours, twice a month,³ which equals \$50,688 per year or \$974.77 per week. In addition, claimant testified respondent paid him fringe benefits and his out-of-pocket expenses. But at Chad Wiswell's deposition, the respondent introduced a Payroll Detail Report that shows claimant was paid \$1,056 in gross wages twice a month.

For the 2004 tax year, respondent provided claimant with a W-2 Earnings Summary that indicates the company paid claimant \$15,840 in wages for that year. In addition, respondent also provided claimant with a Form 1099-Misc for the 2004 tax year that indicates the company paid him \$18,480 in non-employee compensation.

Furthermore, claimant's 2004 U.S. Individual Income Tax Return is consistent with the W-2 Earnings Summary and the Form 1099-Misc as it indicates claimant received \$15,840 in wages during 2004 and another \$18,480 in business income, upon which he paid self-employment tax. The Schedule C-EZ listed claimant as the proprietor having a principal business of performing geophysical surveying and mapping services. According

¹ R.H. Trans. at 9.

² *Id.* at 7, 8.

³ *Id.* at 8.

to claimant, the \$15,840 sum represents the one-half of his salary that respondent paid him in payroll checks and the \$18,480 represents the other half of his \$24 per hour salary plus his out-of-pocket expenses.

Ross Wakefield is an accountant who prepared both claimant's and respondent's 2004 tax returns. Mr. Wakefield testified the \$15,840 paid to claimant was noted as wages on both claimant's 2004 Form 1040 Individual Income Tax Return and respondent's 2004 Form 1120S Income Tax Return for an S Corporation. In addition, Mr. Wakefield testified the \$18,480 that was labeled in claimant's individual income tax return as business income was included in respondent's Form 1120S return as contract labor. Mr. Wakefield initially testified that the \$18,480 in question was *not* part of claimant's salary. Mr. Wakefield testified, in part:

Q. (Mr. Davis) And are you aware of the manner in which Mr. Wiswell [claimant] was compensated for his contributions at Blair Surveying over the years?

A. (Ross Wakefield) He was usually paid a salary.

Q. And even though it says that Tim Wiswell received profits pursuant to his 2004 tax return, that entry [\$18,480] was really for a guaranteed salary; is that correct?

A. No.

Q. What was that line for?

A. That would have been for certifications after he was taken off the salary. That was for the contract labor. That was all certifications for survey certifications or engineer certifications that were paid to other individuals to do that because nobody -- once Tim was taken off salary, nobody had the ability to certify the surveys.⁴

After first indicating the \$18,480 in question was not paid as a salary, Mr. Wakefield then testified he believed claimant was paid a salary every two weeks based upon 88 hours but he was unsure whether the hourly rate was \$24 per hour. Moreover, he testified that all the compensation claimant received during the 26-week period before the work-related accident in August 2004 was *guaranteed salary* for the work claimant performed. Consequently, Mr. Wakefield's testimony was inconsistent and the parties did not resolve the inconsistency.

⁴ Wakefield Depo. at 11, 12.

Q. (Mr. Davis) And he [Chad Wiswell] testified that the salary was set up for Tim Wiswell to be compensated for 88 hours at \$24 per hour paid on an every two-week basis; is that correct?

A. (Mr. Wakefield) I don't remember. It sounds right to me and that sounds right. I know he was paid 88 hours every. . .

Q. And that compensation was guaranteed; is that correct?

A. Yes, he was on a salary basis.

Q. Chad Wiswell further testified that the guaranteed salary if you broke it down on a weekly basis would be \$1,056 per week. Would that be generally correct?

A. Oh, whatever his salary was times 40 hours. If it was 24, yes. I don't have anything in front of me to show that it was \$24 an hour. I'd have to go look on another computer. I don't remember what his salary is.⁵

Unfortunately, the parties did not request Mr. Wakefield to review his records regarding claimant's salary. And Mr. Wakefield is confident the 2004 tax returns he prepared for claimant and respondent are accurate.

Due to the unresolved inconsistencies in the record, the Board concludes claimant has failed to prove the \$18,480 treated as self-employment income in claimant's 2004 tax forms (upon which he paid self-employment taxes) should be included in his pre-injury average weekly wage. Accordingly, the pre-injury average weekly wage should be based upon the \$1,056 in gross wages claimant was paid twice a month. Accordingly, claimant's pre-injury average weekly wage for purposes of this claim is \$487.38 (\$1,056 per check x 24 payments per year = \$25,344 per year. $\$25,344 \div 52 \text{ weeks} = \487.38 per week).

2. What is the nature and extent of claimant's injury and disability?

The record contains the opinions of three physicians who evaluated claimant's impairment for purposes of this claim.

Dr. Daniel D. Schaper, who is a board-certified orthopedic surgeon, began treating claimant on the day of the accident. The doctor operated on claimant's right knee and leg to repair the tibial plateau fracture, which involved the lower half surface of the knee joint. The doctor noted claimant complained of right hip pain in September 2004, at which time x-rays were taken that were interpreted as negative. Dr. Schaper does not recall any more

⁵ Wakefield Depo. at 13, 14.

hip complaints. The doctor, who last saw claimant in April 2005, concluded claimant had a 50 percent impairment to his right lower extremity that converted to a 20 percent whole person impairment. The doctor did not feel claimant had impairment in his hip. Although the doctor could not recall exactly how he arrived at the impairment rating, the doctor testified he used Table 64 of the *AMA Guides*⁶ (4th ed.).

Dr. Schaper concluded claimant had a severe altered gait, which the doctor believed was permanent unless claimant underwent a right knee replacement. And according to Dr. Schaper's February 2005 office notes, claimant will eventually need to have the plate and screws removed from his right knee. The doctor also believes claimant will eventually need a total knee replacement. Finally, Dr. Schaper recommended permanent restrictions – no kneeling or squatting and limit walking to three hours per day.

In April 2005, board-certified orthopedic surgeon Dr. Edward J. Prostic examined claimant at his attorney's request. Dr. Prostic diagnosed a severe bicondylar fracture of the proximal tibia, which most likely will eventually require claimant to undergo a total knee replacement. The doctor also diagnosed trochanteric bursitis in the right hip and suspected early arthritis in that hip. The doctor rated claimant under the *AMA Guides* (4th ed.) as having a 15 percent whole person impairment rating due to the severe right knee fracture and a 2 percent whole person impairment due to the bursitis in the right hip. In addition to Dr. Schaper's restrictions, Dr. Prostic would further restrict claimant from heavy lifting or carrying and significant climbing.

Dr. Mark Bernhardt, who was authorized by Judge Howard to perform an independent medical evaluation, examined claimant in October 2005 and diagnosed, among other things, a healed bicondylar tibial plateau fracture in the right leg, right knee pain and stiffness secondary to the fracture, and right hip pain from probable trochanteric bursitis. The doctor attributed the right hip pain to compensatory changes related to claimant's altered gait. Using the *AMA Guides*, Dr. Bernhardt rated claimant as having a 10 percent whole person impairment. The doctor found claimant had a 7 percent whole person impairment due to mild antalgic gait derangement, a 2 percent whole person impairment from stiffness and lost range of motion in the right knee, and a 1 percent whole person impairment for the trochanteric bursitis.

In addition, Dr. Bernhardt concluded claimant was able to perform sedentary, light and medium work as defined by the *Dictionary of Occupational Titles*. The doctor, however, felt claimant could not kneel for prolonged periods of time and would have problems working on uneven ground working as a surveyor and climbing on foundations.

⁶ American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

Based upon claimant's testimony as well as the expert medical opinions, the Board finds claimant has sustained permanent injury both to his right leg and right hip as a result of his August 2004 accident. The Board is not persuaded that any one of the three doctors' ratings is more accurate than the other two. Accordingly, the Board averages their whole person ratings (20 percent, 17 percent and 10 percent) and finds claimant has sustained a 16 percent whole person impairment due to his work-related injury.

Claimant's permanent disability benefits are defined by K.S.A. 44-510e because claimant's hip injury is not listed in the schedules of K.S.A. 44-510d. Claimant's permanent disability, however, is limited to his 16 percent whole person functional impairment rating. As indicated above, the parties stipulated claimant's post-injury wages are \$505.85 per week, which is more than his pre-injury wage of \$487.38. And under K.S.A. 44-510e, a worker is only entitled to work disability benefits (a permanent partial general disability greater than the functional impairment rating) when there has been a wage loss greater than 10 percent.

In short, the June 23, 2006, Award should be modified to reduce claimant's permanent partial general disability from 61.05 percent to 16 percent.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.⁷ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the June 23, 2006, Award to grant claimant a 16 percent permanent partial general disability.

Timothy B. Wiswell is granted compensation from Blair Surveying, Inc., and its insurance carrier for an August 9, 2004, accident and resulting disability. Based upon an average weekly wage of \$487.38, Mr. Wiswell is entitled to receive 28 weeks of temporary total disability benefits at \$324.94 per week, or \$9,098.32, plus 64.32 weeks of permanent partial general disability benefits at \$324.94 per week, or \$20,900.14, for a 16 percent permanent partial general disability, making a total award of \$29,998.46, which is all due and owing less any amounts previously paid.

Future medical benefits may be considered upon proper application to the Director.

⁷ K.S.A. 2005 Supp. 44-555c(k).

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of December, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Clark H. Davis, Attorney for Claimant
Douglas D. Johnson, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge